

May 19, 2006

Municipal Stormwater Phase II Eastern Washington Comment
WA Department of Ecology
Water Quality Program
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To Whom It May Concern:

BIAW appreciates this opportunity to comment on the Small MS4 Permit for Eastern Washington. BIAW is the largest trade association in the state, representing over 11,960 members involved in various aspects of the residential construction process. The typical BIAW member builds five to 15 homes a year. Unlike national builder corporations, these members have limited resources to navigate the complicated and costly maze of land use and environmental regulations in Washington.

Unfortunately, the Small MS4 Permit for Eastern Washington only adds to the regulatory burden of contractors. In addition to complying with onerous state stormwater standards, they will now have an even more burdensome, duplicative process at the local level to contend with. The unfortunate result will be higher housing prices and small, generational businesses closing their doors or selling to national builders. The following comments detail BIAW's opposition and questions regarding the MS4 Permit:

1. The permit is redundant, confusing, and overly burdensome.

The permit circumvents any flexibility of the Construction Stormwater General Permit (CSGP) by forcing local governments to impose far more stringent standards than DOE is willing to do or the EPA recommends. The permit should focus only on those projects, programs, and providers that are not currently covered by the CSGP or industrial permit. Duplicative regulatory programs create conflicting agency opinions and directives, delay the construction process, increase the cost of housing, unnecessarily burden financially strapped local governments, and waste taxpayer money. S.5.B.4 should be eliminated because it is a regulatory reiteration of the construction and industrial general stormwater permits. At a minimum, the permit should

direct local governments to exempt construction general stormwater permit applicants from S.5.B.4.

Why are there no exemptions comparable to the construction permit? The CSGP erosivity waiver exempts a project from the permitting process, but the MS4 erosivity waiver only relieves the contractor from Stormwater Pollution Prevention Program (SWPPP) review. Similarly, the CSGP exempts projects that infiltrate all stormwater to the ground. The Eastern WA MS4 does not require local governments to give a similar exemption. The closest language to this is Appendix I of Western WA Phase II, and it only allows an exemption to the seasonal work limitations.

The requirements for S.5.B.4 (construction controls) are almost identical to S.5.B.5 (post-construction controls). In fact, S.5.B.5 primarily speaks to construction controls. In comparison, the Western WA Small MS4 permit only has one section on managing construction stormwater (S.5.C.4).

- S.5.B.5.a.ii and iii include the phrases (sometimes repeatedly): “project proponents,” “impervious surfaces created,” “proposed land use,” “facilitate plan review,” “construction phase,” “during construction,” “site plan review,” “[p]rior to construction,” and “during installation. These are all construction-phase actions, not post-construction. All construction-phase references and requirements should be contained in S.5.B.4.
- What are post-construction controls? Ecology does not define this phrase, nor does it indicate what type of requirements and/or restrictions it intends by this phrase. The only post-construction controls alluded to in S.5.B.5 are “adequate ongoing long-term operations and maintenance of the BMPs approved by the Permittee” and post-construction inspections.
- S.5.B.5.a.ii states:
“All Permittees shall adopt requirements for project proponents to ensure adequate ongoing long-term operation and maintenance of the BMPs approved by the Permittee.”
Are these temporary or permanent BMPs? Does Ecology intend for builders and developers to be responsible for maintenance and operation of BMPs in perpetuity? Any degree of responsibility after construction is unreasonable, economically burdensome, and fraught with liability. Moreover, post-construction liability will limit the ability to obtain project financing.
- Similarly, Core Element #7 (Appendix 1, p 16), states:
“Where structural BMPs are required, projects shall operate and maintain the facilities in accordance with an Operation and Maintenance (O&M) plan...”.

What BMPs are regarded as “structural”? Also, “projects” inaccurately and prematurely places long-term O&M on the builder or developer, when in truth this responsibility will remain with the property owner or his or her designee. Further, creating an O&M plan is costly and raises liability concerns.

2. Perhaps the most egregious aspect of this permit, site plan review is unnecessary and extremely costly--to taxpayers, homeowners, contractors, and local governments.

Construction stormwater general permit applicants should be exempt from site plan review, including Stormwater Site Plan (SSP) and SWPPP development.

- The EPA requires “procedures for site plan review of construction plans that consider potential water quality impacts.” (Fact Sheet 2.6). This suggests general consideration of erosion issues in the currently established platting or subdivision process, not a separate site plan review with a comprehensive SSP and SWPPP due at application.
- SSPs must be reviewed prior to development. (S.5.B.4.b.i, S.5.B.5.b.i). Because SSPs include SWPPPs, this early review is onerous and contrary to legal precedent (see #3 below). Contractors already struggle to obtain timely permits from local governments. Adding another review process will further aggravate delays in the permitting program and add to the cost of housing. The Governor issued an Executive Order in February, 2006 (EO 06-02) that directs state agencies to reduce regulatory barriers and “make it easy to do business in the State of Washington.” Ecology is doing the opposite with this permit.
- Core Element #1, Appendix 1, requires SSPs to be prepared as detailed in the Eastern Washington Stormwater Manual. The Manual requires a “comprehensive report,” which includes a site map, downstream analysis report, preliminary BMP design, permanent stormwater control plan, drainage report, construction plans. A single SSP could cost upwards of 20 thousand dollars. Contractors can barely afford to develop SWPPPs, let alone the myriad of complex, engineered reports and plans of a SSP.
- If the contractor applicant is developing a SWPPP (which includes a site map and engineered BMPs [if needed by the site]), why is a SSP necessary?

3. Pre-application SSP and SWPPP review is contrary to legal precedent and conflicts with the construction stormwater permit.

Pre-application SSP and SWPPP review also undermines the flexible nature and purpose of the general permit process. CSGP applicants should be exempt from site plan review, and a completed SWPPP available at the beginning of construction, consistent with the construction permit.

- SSPs must be reviewed prior to development. (S.5.B.4.b.i, S.5.B.5.b.i). The CSGP requires a SWPPP to be “prepared and implemented ... beginning with initial soil disturbance and until final stabilization.” The MS4 permit represents a disingenuous repeal of Ecology’s decision to comply with judicial precedent and require SWPPPs at the beginning of construction. Even the language in Core Element #2, Appendix 1, p 4

represents a slight of hand with the removal of “prepared” (“The SWPPP shall be *implemented* beginning with initial soil disturbance and until final stabilization.”).

- The Seventh Circuit Court of Appeals recently highlighted the difference between the individual and general permit process. Requiring “an additional public hearing for each individual NOI and SWPPP would eviscerate the administrative efficiency inherent in the general permitting concept.” *Tex. Indep. & Ryalty Owners Ass’n et al, v Env’t Prot Agency*, 410 F.3d 964, 978 (7th Cir 2005). Similarly, requiring local governments to institute early SWPPP review for the same projects obtaining a CSGP negates the efficiency intended for that program.
- Detailed, prescriptive, and enforceable requirements contained in the Construction Stormwater General Permit and included in this draft MS4 permit (i.e., required application of Eastern Washington Stormwater Manual) provide overwhelming assurances as to how municipalities will regulate stormwater discharges. Thus, early SWPPP review is not necessary to guarantee water quality protections (as compared to the municipal permit program at issue in *Environmental Defense Center Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003)).
- Local governments do not have the resources, including manpower, to conduct SSP and SWPPP reviews before construction. If local governments are forced to do so, they will sacrifice other permitting efficiencies and services needed by the development community.

4. Requiring CESCLs (Core Element #2, p 7) is unnecessary and unreasonable, particularly for small construction sites.

Hiring an engineer or other specialist or designating an employee to serve as the CESCL is a great expense for the smaller contractor, especially those who have not experienced the CSGP or local erosion ordinances.

5. “Qualified personnel” is vaguely defined in S.5.B.4 and S.5.B.5, as well as in Definitions and Acronyms, p 47.

- The Construction Stormwater General Permit allows only authorized representatives of DOE who present credentials and other legally required documents to enter and inspect a project site. Why does the MS4 permit not hold qualified personnel of local jurisdictions to the same standard?
- What is “adequate training”? (S.5.B.4.c.ii, S.5.B.5.d) What is “professional training”? (p 47) Training and standards for “qualified personnel” need to be included. These individuals are vested with review, inspection, and enforcement authority, all of which could significantly slow or stop a project. Ecology is extremely detailed about the training required of CESCLs, why is it not equally detailed for local government stormwater personnel?

- The permit should require that Permittees and their “qualified personnel” document all decisions, actions, statements, reviews, reports, requirements, etc. and provide the same in writing to the construction applicant.

6. Ecology compromises vesting laws and shirks its responsibility to fully inform and guide local governments by not including statutory and judicially established vesting limitations in the permit.

- Ecology needs to provide parameters on "to the extent allowable by law." (S.5.B.5)
- S.5.B.5.a.i. illegally compromises long-standing vesting principles. This section provides in part:

“[T]he ordinance or regulatory mechanism must apply...to all new development and re-development projects...that are vested after the effective date of the ordinance or regulatory mechanism, *or three years from the effective date of this permit*, whichever is sooner.

To comply with this provision, new development and redevelopment projects that are vested after the effective date of this permit but before the adoption of the ordinance or regulatory mechanism, Permittees must require post-construction stormwater controls to the extent allowable under local and state law.”

Not only are these sections confusing, they direct local governments to disregard vesting laws. Only those regulations in place when a complete application is filed can be applied to a project. Until the local erosion ordinance is adopted, it can not be enforced against development and re-development projects, including those extending beyond Ecology’s three-year limit.

- The third bullet of S.5.B.5.a.i indicates a different regulatory threshold than elsewhere in the permit. This conflicting language is also located on page 16, first bullet and third bullet.

7. The erosivity waiver requirements undermine the intent of the waiver: to alleviate the burden on dry weather construction projects.

- This is not a true exemption for dry-weather construction. Contractors are required to submit two applications: one to Ecology and one to the local jurisdiction.
- The provisions of Core Element #2, p 3 and p 8 (regarding erosivity waivers) are confusing and inconsistent. P 3 exempts projects from site plan review, while p 8 relieves site operators of local jurisdiction SWPPP review. Please clearly state, in both sections, what exactly the site operator is expected to do or not do.

- An erosivity waiver at the local level only exempts the applicant from SSP and SWPPP review. Core Element #2, p 3 states: “Local jurisdictions may choose to allow site operators to apply an ‘Erosivity Waiver’ to projects...such projects would be waived from the requirement that the *jurisdiction review* site plans...”. Core Element # 2, p 8 states: “The local jurisdiction may allow construction site operators to qualify for a waiver from the requirement to *submit a SWPPP for local jurisdiction review*.” This indicates that preparation of SSP documents and the SWPPP are still required.
- The demand for escalating enforcement sanctions contained in S.5.B.4.a.v is heavy-handed, particularly given the lengthy and complex review and approval process demanded by this permit. Also, construction is often unavoidably delayed; will a contractor be fined for exceeding Ecology’s established timeframe? Will local governments’ SWMPs be approved if they allow grace periods for unexpected construction delays?

8. Why is the authorized non-stormwater discharge list (S.5.B.3.b.iii) different than the CSGP?

The list does not include excavation de-watering, water used to control dust, routine external building wash, and landscape irrigation. At a minimum, S.5.C.3.b.iv should state: “The ordinance or other regulatory mechanism shall prohibit the following categories of post-construction non-stormwater discharges...”.

9. Does the 10K sq. feet of impervious surface threshold in Core Element #6 (pg 14) include all impervious surfaces in a subdivision?

Is the 10K sq. ft. threshold cumulative or single-surface?

10. Exposed soil requirements (Core Element #2, Appendix 1, p 5) are limited and redundant.

- These are unreasonable time restraints, particularly in arid regions of the state. The cost of covering all soils with blankets or plastic, including the man hours, is impressive and only adds to the cost of housing.
- These sections are worded differently in the construction permit, which uses area designations, not mean annual precipitation. The permits should use consistent terminology.
- This represents a mandatory, prescriptive imposition of what should be an optional BMP. The directive is for the contractor to determine and install the best BMPs to prevent turbid discharge that impairs water quality. Covering exposed soils is one of the BMPs that a contractor can use, but it is not always the best or most efficient.

11. The building community should be adequately represented in the public participation process (S.5.B.2.a).

At a minimum, a land developer and builder representative should be fully involved in the development, implementation and update of the local government's SWMP.

BIAW appreciates your consideration of these comments and significant amendment of the Eastern Washington MS4 Permit to alleviate its unnecessary and unreasonable impact to the construction industry.

Sincerely,

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